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In The

Supreme Court of the United States

October Term, 1997

BAUGHANS, INC.; BLUE EARTH ENTERPRISES, INC.; KEVIN BORES; CHARLES F. BUCK; DAVIS PIZZA ENTERPRISES, INC.; DIANE A. DAVIS; FISHER PIZZA, INC.; JAMES B. FISHER, JR.; JRW PIZZA; LUGENT PIZZA, INC.; JOSEPH J. LUGENT; SCALE PIZZA, INC.; SPRING GARDEN PIZZA, INC.; BRAD L. WALKER; JAMES R. WOOD; INTERNATIONAL FRANCHISE ADVISORY COUNCIL, INC.,

Petitioners,

vs.

DOMINO'S PIZZA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether in a federal antitrust action a franchisor's exercise of its contractual right to regulate its franchisees' purchases of supplies can be characterized as "market power" in a "relevant market" encompassing only supplies approved by the franchisor, without regard to the franchisees' contractual remedies and the interchangeability of those supplies with comparable products that have not been approved.

RULE 29(6) STATEMENT

Respondent DPI is a subsidiary of TISM, Inc., a privately owned corporation. DPI has no nonwholly owned subsidiaries.

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Respondent Domino's Pizza, Inc. ("DPI") respectfully requests that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE

A. Factual Background[1]

DPI is a retail food service company that sells pizza and other fast food products through more than 4,000 stores displaying DPI's "Domino's" trademark. Pet. App. 3, 52. Petitioners comprise 11 franchisees who operate 58 of the approximately 3,500 Domino's stores owned by franchisees. Pet. App. 77-81.

Each of the petitioners joined the Domino's system by executing a standard franchise agreement with DPI. Pet. App. 3. Under these contracts, petitioners agreed, in return for entry into the Domino's system, to follow uniform practices and procedures specified by DPI with respect to numerous aspects of Domino's pizza store operations. Pet. App. 4, 52-54. The franchise agreements provide that DPI

> may in [its] sole discretion require that ingredients, supplies and materials used in the preparation, packaging, and delivery of pizza be purchased exclusively from us or from approved suppliers or distributors.

Pet. App. 4.

The franchise agreements also grant DPI the right to impose "reasonable limitations on the number of approved suppliers or

1. The following summary is based on petitioners' factual allegations, which respondent assumes to be true solely for purposes of opposing the petition.

distributors of any product." *Id.* Significantly, DPI's rights are subject to a reasonableness clause providing that DPI must "exercise reasonable judgment with respect to all determinations to be made by [DPI] under the terms of this Agreement." *Id.*

International Franchise Advisory Council ("IFAC") is an organization whose members include approximately 40% of the Domino's franchises in the United States. Pet. App. 5. In 1994, IFAC entered into a purchasing agreement with Food Service Purchasing Cooperative, Inc. ("FPC"), which acts as purchasing agent for franchisees of retail level competitors of the Domino's system such as Kentucky Fried Chicken and Taco Bell. Pet. App. 6, 86. Under the purchasing agreement, FPC was charged with developing a purchasing program for Domino's franchisees who desire to purchase pizza supplies and ingredients from sources other than the distribution system operated by DPI. Pet. App. 6. FPC is not a party to this proceeding and was not a party below.

Petitioners claim that DPI has breached its express contract obligations to Domino's franchisees by imposing unreasonable policies and procedures designed to interfere with the purchasing agreement and thereby unreasonably to prevent FPC from developing an alternative distribution service. Pet. App. 6-7, 55-56, 106-07. According to petitioners, DPI's actions contravene their franchise agreements in that the actions do not advance the recognized, joint interests of DPI and its franchisees in maintaining consistency and quality throughout the Domino's system. Pet. App. 86, 96. Petitioners do not allege that, apart from its rights under the franchise agreements, DPI exercises any independent control or market power in any market for pizza ingredients such as cheese, sauce, dough or meats, or any other supply used in Domino's stores. Nor do petitioners assert that such products are so unique that DPI alone can control their supply. Instead, petitioners maintain that DPI's contractual

rights reasonably to restrict ingredients purchases, approve suppliers and otherwise regulate franchisee store operations create "market power" and permit the definition of relevant antitrust markets limited just to Domino's franchisees. *See* Pet. App. 103-05.

B. Proceedings Below

In an amended complaint filed in the United States District Court for the Eastern District of Pennsylvania, petitioners alleged that DPI's actions relating to the supply of ingredients and supplies to Domino's stores: (i) violated the federal antitrust laws; (ii) breached DPI's franchise agreements; and (iii) tortiously interfered with the purchasing agreement between IFAC and FPC. The District Court dismissed the antitrust claims with prejudice for failure to state a claim, and dismissed the supplemental contract and tort claims for lack of subject matter jurisdiction. Pet. App. 51-69. Petitioners moved for leave to file a second amended complaint setting forth essentially the same antitrust and common law claims; the District Court denied this motion. Pet. App. 70-75.

The United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of petitioners' action, principally on the ground that petitioners' alleged "relevant markets" — ingredients and supplies approved for use by Domino's stores — are legally insufficient. Pet. App. 16. Relying on *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992), among other cases, the Third Circuit reasoned that "the outer boundaries of a relevant market are determined by reasonable interchangeability of use." Pet. App. 14; *see id.* at 18. In assessing interchangeability, the Third Circuit stated,

> the relevant inquiry . . . is not whether a Domino's franchisee may reasonably use both approved or non-

> approved products interchangeably *without triggering liability for breach of contract*, but whether pizza makers in general might use such products interchangeably.

Pet. App. 17 (emphasis added).

Because there is no dispute that, contractual constraints aside, approved supplies are interchangeable with non-approved supplies, *see* Pet. App. 17, 18, "the relevant market . . . cannot be restricted solely to those products currently approved by [DPI]." Pet. App. 16. Judge Lay dissented. The Third Circuit subsequently denied petitioners' petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The Third Circuit properly refused to convert a contract dispute arising under a franchise agreement into an antitrust action.

I.

THE THIRD CIRCUIT'S DECISION IS IN ACCORD WITH *KODAK*.

Although petitioners argue that their antitrust claims "plainly parallel" the allegations upheld in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), Pet. 16-17, that is not the case. *Kodak* focused on potential harm to consumers — not franchisees — in a relevant market that arose out of the uniqueness of Kodak parts and that had nothing to do with any contract between Kodak and its customers. Indeed, there was no contract. Here, it is "uncontroverted that Domino's-approved supplies and ingredients are fully interchangeable in all relevant respects with other pizza supplies outside the proposed relevant market." Pet. App. 20-21.

The markets alleged by petitioners are grounded exclusively on the obligations of Domino's franchisees under their franchise contracts with DPI, not lack of interchangeability. As *Kodak* instructs, "market definition . . . . can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." 504 U.S. at 482 (citations omitted) (emphasis added). The only "commercial realities" alleged by petitioners are those faced not by consumers of pizzas but by allegedly mistreated franchisees within the contractually defined framework of the Domino's system.[2]

In stark contrast, the antitrust claims upheld in *Kodak* were based, not on contract obligations, but on alleged single-brand product markets consisting of service and unique parts for Kodak copiers. In the absence of a contract affording a remedy to consumers that had purchased its copiers, Kodak initiated a policy of refusing to supply highly specialized replacement parts to independent service organizations, thereby forcing owners of its machines to use only Kodak's service system. The Court held that a relevant market limited to Kodak products was appropriate "[b]ecause service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts." 504 U.S. at 481-82. Because copier owners had no way of predicting Kodak's policy change and could switch out of Kodak copiers only at significant cost, the Court ruled that they were potentially "locked in" to "aftermarkets" for specialized

2. The goal of the Sherman Act "is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); *see also State Oil Co. v. Khan*, __ U.S. __, 118 S. Ct. 275, 277, 282 (1997) ("the primary purpose of the antitrust laws is to protect interbrand competition") (overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 152-54 (1968)); *Grappone Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794 (1st Cir. 1988) (antitrust laws exist to "protect the competitive process in order to help individual consumers") (Breyer, J.).

Kodak parts and service. As a result, Kodak may have possessed "market power" (not contract rights) in an aftermarket for Kodak parts, notwithstanding that the primary market for all copier brands was itself competitive. *See* 504 U.S. at 465-66, 477-78.

Here, the Domino's franchisees did not invest in an expensive and complex piece of machinery. They joined a business enterprise by entering into franchise agreements. Petitioners are allegedly "locked in" to "aftermarkets" for pizza supplies approved by DPI not because pizza ingredients are unique but *only* by virtue of their franchise agreements. Pet. App. 22-23. Whereas the consumers and service providers in *Kodak* had no recourse — other than the antitrust laws — the franchisees in this case are parties to binding contracts that govern the subject matter of this dispute and that clearly provided notice of DPI's right to approve suppliers. Pet. App. 32, 64; *see also Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 763 (7th Cir. 1996) ("The Court did not doubt in *Kodak* that if spare parts had been bundled with Kodak's copiers from the outset . . . purchasers could have shopped around for competitive life-cycle prices.").[3]

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3. Petitioners cite *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) — which was overruled on other grounds by *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) — apparently for the proposition that an antitrust violation cannot be defended on the ground that it is embodied in a franchise contract. Pet. 10. While it is true that a defendant cannot avoid antitrust liability simply because the plaintiff agreed to the alleged violation, *Perma Life* says nothing about whether a relevant market can be defined by the terms of a franchise or other contract.

Nor does the decision in *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) — a case evaluating requirements contracts rather than tying arrangements — support petitioners' claims. As Justice O'Connor recognized in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,

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Petitioners further assert that, like Kodak, DPI has instituted new and unreasonable policies of which Domino's franchisees were unaware when they entered into Domino's franchise agreements. Pet. 16-18. But petitioners do not deny — indeed they allege — that they retain their contract rights and remedies against unreasonable behavior by DPI. The antitrust laws were certainly not intended to transform the law of contracts by using contractual obligations to define a series of "markets" in which one party to the bargain exercises contract-driven "monopoly power" over the other.[4] Antitrust policy simply is not concerned with "restrictions on the autonomy of independent businessmen." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

In *Kodak*, the Court refused to accept *a priori* conclusions about the extent to which conduct harmful to "locked-in"

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466 U.S. 2 (1984), *Standard Oil*'s dicta concerning tying arrangements were "not taken literally even by the cases that purported to rely upon it." 466 U.S. at 34 (O'Connor, J., concurring).

4. *See* Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 Sup. Ct. Econ. Rev. 43, 62 (1993) ("Instead of finding 'monopolies' everywhere, 'hold-up' problems should be left to contract law.").

Petitioners allege that they lacked notice of DPI's control of the supplier-approval process, notwithstanding that the franchise agreements expressly reserve DPI's right to require that supplies and ingredients be purchased from DPI-approved suppliers or from DPI itself. Pet. App. 97-98; *see id.* 129-30. Even if there were a question as to notice, petitioners' allegations based on Domino's-only relevant markets would still fail to state a claim. The overriding flaw in petitioners' antitrust theory is not that franchisees had notice of Domino's right to approve suppliers but rather that the only "power" DPI allegedly exercises over its franchisees arises out of contractual arrangements that afford common law remedies for breach.

consumers in aftermarkets (for copier servicing and parts) is necessarily precluded by the existence of competition in a related pre-market (for the copiers themselves). *See* 504 U.S. at 469-70. The decision below does not rest on a comparable factual assumption as to whether competition in other markets curbs harmful conduct in the supposed "aftermarkets" for pizza supplies and ingredients used in Domino's stores. Instead, the court of appeals addressed the *legal* issue of whether Domino's-only "aftermarkets" arising out of the Domino's franchise agreements — not the attributes of any supply or ingredient sold in those supposed markets — may comprise relevant markets for purposes of antitrust analysis. Pet. App. 12-13, 16-18. This question does not turn on product attributes, consumer preferences, cross-elasticity of demand, or any other factual issue. It is a pure question of law.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

Despite the petition's suggestions to the contrary, there is no conflict among the courts of appeals on the question presented. Instead, the Third Circuit's decision is in harmony with the decisions of all of the courts of appeals to have considered similar attempts "to shoehorn [antitrust] allegations into [the] *Kodak* 'derivative aftermarket' mold." *Lee v. Life Ins. Co. of North America*, 23 F.3d 14, 17 (1st Cir.), *cert. denied*, 513 U.S. 964 (1994). *See Valley Prods. Co., Inc. v. Landmark*, 128 F.3d 398, 405-07 (6th Cir. 1997); *United Farmers Agents Ass'n v. Farmers Ins. Exchange*, 89 F.3d 233, 236-37 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 960 (1997).[5]

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5. Notably, the Court denied petitions for certiorari in the two of these three post-*Kodak* cases in which petitions were filed. *See also PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 819-21 (6th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 2434 (1997).

The Fifth Circuit

In *United Farmers Agents*, the Fifth Circuit expressly recognized that an alleged "lock in" of a franchisee arising out of a franchise agreement cannot form the basis for a single-brand relevant market under *Kodak*. In that case, insurance agents brought antitrust claims against an insurance group with which they were affiliated. The agents claimed that the group had forced them to purchase computer equipment as a condition to obtaining access to a policy information data base. Relying on *Kodak*, the agents argued that high information and switching costs caused them to be "locked in" to a supposed "market" limited to the group's policy information. The Fifth Circuit expressly rejected this theory as a matter of law:

> This suit is essentially an intracompany dispute over how to run a computer system, not a valid claim under antitrust laws. Economic power derived from contractual agreements such as franchises or in this case, the agents' contract with [the insurance companies], "has nothing to do with market power, ultimate consumers' welfare, or antitrust". Benjamin Klein & Lester F. Saft, The Law and Economics of Franchise Tying Contracts, 28 J. Law & Econ. 345, 356 (1985).

89 F.3d at 236-37.[6]

6. Contrary to petitioners' dismissive characterization, Pet. 13, the Klein & Saft article cited by the Fifth Circuit is an influential piece of scholarship that has been favorably cited by numerous courts, as well as (in dissent) by three Members of this Court. *See Kodak*, 504 U.S. at 491 (Scalia, J., dissenting, joined by O'Connor, J. and Thomas, J.); Pet. App. 23 n.12 (opinion below); *United Farmers Agents*, 89 F.3d at 236-37; *Chicago Prof'l Sports L.P. v. NBA*, 95 F.3d 593, 598 (7th Cir. 1996); *Mozart Co. v. Mercedes-Benz of North*

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Inexplicably, petitioners do not discuss — or even cite — *United Farmers Agents* in their petition, even though the court below relied on that decision. Pet. App. 17. Instead, petitioners emphasize the Fifth Circuit's much earlier decision in *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964 (5th Cir. 1977). Like other time-worn cases cited in the petition, *see* Pet. 11-12 n.9, *Heatransfer* involved allegations that a franchisor had exercised power within a very narrowly defined market, in that case "the manufacture and sale of air-conditioners for only Volkswagen, Porsche and Audi automobiles." *Id.* at 979-81; *see also Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 712-14 (7th Cir. 1979) (franchisor had market power in the "drive-through retail photo processing submarket"). *Heatransfer* and the similar cases cited by petitioners have nothing to do with lock-ins, aftermarkets, information costs, or any other aspect of the *Kodak* framework, nor did they involve single-brand "markets" allegedly arising out of franchise agreements. Though based on doubtful economic assumptions, those decisions at

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America, Inc., 833 F.2d 1342, 1346 (9th Cir. 1987); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 671 n.1 (7th Cir. 1985); *Tominaga v. Shepherd*, 682 F. Supp. 1489, 1493-95 (C.D. Cal. 1988); *see also New Jersey American, Inc. v. The Allied Corp.*, 875 F.2d 58, 62 (3rd Cir. 1989) (citing Klein & Saft article in ruling on claims under the New Jersey Franchise Practices Act).

In *Wilson v. Mobil Oil Corporation*, another lawsuit in the Fifth Circuit alleging tying by a franchisor, the district court denied the defendants' motion to dismiss, strongly disagreeing with the decision of the district court below. *See* 940 F. Supp. 944, 951-52 (E.D. La. 1996). One year later, however, the *Mobil Oil* district court essentially reversed itself, granting the defendants summary judgment based in part upon the decision of the court of appeals in this case. *See* __ F. Supp. __, 1997 WL 675326 at *11 (E.D. La. Nov. 18, 1997). The petition cites the first *Mobil Oil* decision but fails to mention the second.

least focused on an alleged relevant product's purported lack of interchangeability. They lend no support to petitioners' antitrust theories, nor do they represent any part of a purported split among the courts of appeals on these issues. *See United Farmers*, 89 F.3d at 236-37 (5th Cir.); *see also Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 762-63 (7th Cir. 1996) (rejecting distributor's *Kodak*-based antitrust tying claims where defendant manufacturer lacks power in highly competitive market for mid-range computers).

The Sixth Circuit

Since the Fifth Circuit's decision in *United Farmers*, the Sixth Circuit similarly has rejected an attempt to conform an alleged tying claim arising in the franchise context to the unique circumstances at issue in *Kodak*. *See Valley Prods*, 128 F.3d 398 (6th Cir. 1997). The plaintiff in *Valley Products* was a terminated supplier of soap and other amenities to hotel franchisees who alleged that the franchisees were illegally coerced into purchasing other suppliers' amenities as a condition to their franchise rights. In affirming a Rule 12(b)(6) dismissal, the Sixth Circuit rejected the plaintiff's attempt to model its tying claim on a *Kodak* "lock-in" theory. In the course of its opinion, the court expressly endorsed the reasoning of the opinion below, finding that the Third Circuit's holding supported dismissal of the supplier's tying claim. *See Valley Products* 128 F.3d at 405 ("[w]e are in basic agreement in the approach followed in *Domino's*"); *see also id.* at 407.

The Sixth Circuit's endorsement of the rationale of the opinion below belies petitioners' assertion of a divergence between the Third and Sixth Circuits. In suggesting that there is a divergence, petitioners cite *PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811 (6th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 2434 (1997), in which the Sixth Circuit expressly rejected another *Kodak*

tying claim that did not concern contract rights. The *PSI* decision is in no sense inconsistent with the decision below.

In *PSI*, an independent repair service for industrial control equipment alleged an illegal tying arrangement between Honeywell-brand circuit board components and servicing of Honeywell circuit boards. *See* 104 F.3d at 818-20. The Sixth Circuit affirmed summary judgment dismissing this claim, finding that the plaintiff's argument

> would expose many manufacturers of durable, expensive equipment to potential antitrust liability for having inherent power over the aftermarkets of their products, a result certainly not intended by *Kodak* and not consistent with *Jefferson Parish.*

Id. at 820.[7]

Nor is the *Valley Products* decision, following the court of appeals below, at odds with the earlier decision of the Sixth Circuit denying summary judgment in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert. dismissed*, 512 U.S. 1216 (1994). The potential "market power" in that case derived from a requirement imposed by Ford Motor Company — a non-party — that all of its outside designers use specified software. The defendant distributor, a Ford licensee, was accused of improperly leveraging Ford's requirement by

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7. The basis for petitioners' argument appears to be that the court below did not ascribe the same significance as the Sixth and Seventh Circuits to the "change in policy" that was discussed by the *Kodak* majority in reaching its determination in that case. Pet. 21-24. This argument misses the essential point that in neither *Kodak* nor any of the other cases relied on by petitioners did the plaintiff allege a relevant market grounded in a contractual arrangement, and that in none of those cases did such a contract provide remedies for the misconduct alleged.

conditioning sales of the Ford-required software upon the designers' purchase of additional software support services. These circumstances are not comparable to those presented here because, among other things, the distributor and the designers were not parties to a contract affording them respective rights and remedies.

The First Circuit

Also consistent with the court of appeals decision below is the decision of the First Circuit in *Lee v. Life Insurance Co.* In *Lee*, university students alleged an illegal tying arrangement between their university education and health insurance, contending that they were subject to a *Kodak* "lock-in" after matriculation in their first semester. The First Circuit rejected this theory and affirmed the dismissal of the complaint for failure to state a claim, in part because subsequent semesters of undergraduate education could not be construed to be a "derivative aftermarket" under *Kodak*. *Lee*, 23 F.3d at 19-20.

The *Lee* decision logically followed from *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (Breyer, J.), a pre-*Kodak* opinion that is squarely in accord with the Third Circuit's decision below. *Grappone* analyzed tying claims by Subaru franchisees challenging Subaru's policy of conditioning the delivery of new cars upon the purchase of spare parts. The First Circuit concluded that the arrangement did not violate Section 1 of the Sherman Act, finding that the attractiveness of the Subaru brand could not give rise to the type of market power required to prevail on such a claim. *Grappone*, 858 F.2d at 796-97, 798 (citing *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 620-21 (1977) ("*Fortner II*")).

The Ninth Circuit

In *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987), the Ninth Circuit followed similar reasoning. Like *Grappone*, *Mozart* involved a challenge to a car manufacturer's policy of requiring franchised dealers to sell only replacement parts that were supplied or approved by the manufacturer. The district court's jury instructions had implied that the market power necessary for plaintiff's tying claims could be proven from the attractiveness of the car maker's trademark or the uniqueness of the automobile. The Ninth Circuit held that such a conclusion was unwarranted, especially in the franchise context:

> To [franchisees the Mercedes] is an article that is purchased at wholesale and sold at retail. The critical issue is whether [Mercedes Benz] possesses the "market power" to force dealers to purchase the tied product rather than acquire the franchise to sell a different automobile. Obviously there are costs in surrendering one franchise and acquiring another, but these are costs unrelated to the "market power" of a unique automobile. . . . this power is related to the franchise method of doing business, not to the possible uniqueness of the car.

Mozart, 833 F.2d at 1346-47.[8]

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8. This holding overruled the rationale of *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971) ("distinctive" trademark held to afford fast-food franchisor market power). *See also Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 671 n.1 (7th Cir. 1985). To the extent that petitioners imply that *Siegel* represents one side of a split among the courts of appeals, *see* Pet. 11-12 & n.9, that suggestion is simply wrong. The pre-*Fortner II* decision of the Eighth

(Cont'd)

Petitioners assert that "*Kodak* vitiated *Mozart*'s rationale," because *Kodak* held that the existence of competition in the primary market for copiers did not undermine as a matter of law the plaintiff's "derivative aftermarket" claims. Pet. 14-15. As discussed above, however, petitioners' "derivative aftermarket" allegations were not dismissed because competition in the market for business franchises — the primary market — constrains DPI's power in the supposed "aftermarkets" for supplies and ingredients used in Domino's stores. Although that is the case, petitioners' allegations were found by the lower courts to fail as a matter of law because relevant markets under the antitrust laws cannot be based on "power" arising out of franchise agreements, as opposed to the intrinsic attributes of the supplies and ingredients sold in the alleged Domino's-only "markets".

The Fourth Circuit

Petitioners mistakenly rely on the Fourth Circuit decision in *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987), a case that involved an earlier challenge to the same Mercedes-Benz policy at issue in *Mozart*. Petitioners' arguments aside, the Fourth Circuit in *Metrix* never addressed the crucial question — definition of the relevant market for the tying product — instead limiting itself to the narrow question whether this Court's decision in *Pick Mfg. Co.*

(Cont'd)

Circuit in *Northern v. McGraw-Edison Co.*, 542 F.2d 1336, 1345 (8th Cir. 1976), also cited in the petition, was based upon a similar, outdated view that market power could arise from the attractiveness or uniqueness of a franchise trademark. *See also Collins v. International Dairy Queen, Inc.*, 939 F. Supp. 875, 880 (M.D. Ga. 1996) (summary judgment denied where plaintiff's expert opines that relevant market may be limited to "soft-serve ice cream franchises").

v. General Motors Corp., 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936) (per curiam), established an automobile industry exception for tying claims under the Sherman Act. *See Metrix*, 828 F.2d at 1036. The *Metrix* court expressly stated that the determination of this issue did not require it to decide whether the plaintiff had proved the requisite elements of an illegal tying arrangement, which would include definition of a relevant market. *Id.*

The Seventh Circuit

Petitioners' suggestion that the decision below conflicts with precedent in the Seventh Circuit is also unsupportable. In *Digital Equipment Corp. v. Uniq Digital Technologies*, 73 F.3d 756 (7th Cir. 1996), that court confronted and rejected an attempt similar to petitioners' to contort a "mundane commercial case" into a *Kodak* tying claim. *See Digital*, 73 F.3d at 763. In that case, Digital Computer replaced the Uniq operating system with a Unix system of its own, prompting antitrust claims from its disappointed rival alleging that Digital's policy of including its own operating system in Digital computers was an illegal tying arrangement. The court rejected Uniq's contention that under *Kodak* "there is a market in a firm's own products, even if it sells in vigorous competition," *id.* at 762, and affirmed the dismissal of the claim. And, well before *Digital*, the Seventh Circuit observed: "A tie involves products that may be sold in separate markets. But a method of doing business (the franchise) is not sold separately from the ingredients that go into the method of business." *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 671 n.1 (7th Cir. 1985).

* * *

In short, the decision below is in accord with all the court of appeals decisions that have considered "derivative

aftermarket" claims since *Kodak*, as well as a variety of pre-*Kodak* franchise-antitrust decisions. Given the absence of conflict among the courts of appeals concerning the question presented and the sound reasoning of the Third Circuit below, the petition should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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